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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 593

KOEHRING COMPANY, PETITIONER

v.

HYDE CONSTRUCTION COMPANY, INC., RESPONDENT

and

KOEHRING COMPANY, PETITIONER

v.

VARDAMAN S. DUNN, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Koehring Company (hereinafter "Koehring"), prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit in the above entitled case entered on July 21, 1965. A petition for rehearing was denied on August 17, 1965.

OPINIONS BELOW

The opinions and orders below are as follows: the order and attached memorandum of the Northern District of Oklahoma, filed September 1, 1964 (R. 82-87)* (Appendix A, infra, page 11); the opinion and Judgment of the Court of Appeals on review of the Northern District of Oklahoma's order, filed July 21, 1965 (Appendicies B and C, infra, page 17); the order of the Court of Appeals denying petition for rehearing, filed August 17, 1965 (Appendix E, infra, page 42). Koehring's petition for rehearing is printed in Appendix D, infra, page 29); and the order of the Court of Appeals staying its mandate (Appendix F, infra, page 42).

Because the specific issues involved here were also ruled on in the same case by the Court of Appeals for the Fifth Circuit, its opinions and orders are also pertinent here. They are: The order of the Court of Appeals for the Fifth Circuit dated September 19, 1963 (R. 136ss-137ss) (Appendix G, infra, page 43, and reported at 324 F.2d 295); the order of the Court of Appeals for the Fifth Circuit dated March 6, 1964, (R. 137ss-138ss) (Appendix H, infra, page 49); and the order of the Court of Appeals for the Fifth Circuit dated March 10, 1964 (R. 23-25) (Appendix I, infra, page 51).

Except as noted the above opinions and orders are not yet officially reported.

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*All references to the printed record are designated "R". Page numbers without suffix are in the initial volume bound by the lower court Clerk; those with the "s" suffix appear in the supplemental record volume prepared by appellants; and the ones having "ss" as a suffix are in the second supplemental record volume submitted by appellee.

JURISDICTION

The order of the Court of Appeals was entered on July 21, 1965 and a petition for rehearing was denied on August 17, 1965. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1) (1958).

QUESTIONS PRESENTED

I. Does a Court of Appeals have the power to order the *instanter* transfer of a cause of action when it determines justice demands such a transfer?

II. Absent extraordinary circumstances, may a Court of Appeals reverse the prior decision of another Court of Appeals in the same case on the identical issue and facts?

STATUTES INVOLVED

28 U.S.C. §§1404 and 1406 provide as follows:

> §1404(a) "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."
>
> §1406(a) "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

28 U.S.C. §1651 provides as follows:

> §1651(a) "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

I. Basic Facts

This controversy involves two identical lawsuits relating to the performance of construction equipment at a U. S. Army Corps of Engineers project near Tulsa, Oklahoma. The first suit was brought by Hyde Construction Company, Inc. (hereinafter "Hyde") on August 30, 1961, against Koehring in the Federal District Court for the Southern District of Mississippi (hereinafter "Mississippi Federal Court"). It prayed for writs of chancery attachment, injunctive relief, a declaratory judgment and a money judgment. (R. 5-11). Approximately a month later Hyde filed an identical complaint against Koehring in the Chancery Court of the First Judicial District of Hinds County, Mississippi (hereinafter "Mississippi State Court").

Various proceedings took place in the Mississippi Federal Court case and on September 19, 1963, the Court of Appeals for the Fifth Circuit, reversing the Mississippi Federal Court, ordered that the case be transferred to the Federal District Court for the Northern District of Oklahoma (hereinafter "Oklahoma Federal Court") for the convenience of the parties and witnesses and in the interests of justice. (R. 136ss-137ss) (Appendix G, infra, page 43). The Mississippi Federal District Judge did not transfer the case as ordered, but on February 24, 1964 entered an order of dismissal upon motion by Hyde (R. 22).

On March 6, 1964, the Court of Appeals for the Fifth Circuit issued an ex parte temporary restraining order prohibiting further proceedings in the Mississippi State Court case which had been scheduled for imminent trial, (R. 137ss-138ss) (Appendix H, infra, page 49), and which involved issues identical to those in the federal ac-

tion that the Fifth Circuit had determined should be tried in Oklahoma.

On March 10, 1964, the Court of Appeals for the Fifth Circuit vacated the Mississippi Federal Court's dismissal of the action and granted a writ of mandamus ordering the Mississippi Federal Judge to transfer the case to the Oklahoma Federal Court. In addition, the Court of Appeals for the Fifth Circuit said:

> "[S]ince phases of the case are pending for imminent trial in the State Courts of Mississippi, and Koehring is of the view that it has a substantial basis for obtaining injunctive relief from the United States District Court for the Northern District of Oklahoma, we think that for the protection of the rights of all concerned, this order should, and hereby does, constitute the writ of mandamus . . . . . The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma." (R. 23-25) (Appendix I, infra, pages 52-53).

The Court of Appeals for the Fifth Circuit, having transferred jurisdiction to the Oklahoma Federal Court, then vacated its March 6th temporary restraining order as being "no longer necessary or appropriate in aid of [the Fifth Circuit's own] jurisdiction" because "the issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this court." (R. 23-25) (Appendix I, infra, page 53).

II. Proceedings Before the Oklahoma Federal Court

On the next day, March 11, 1964, Koehring filed in the Oklahoma Federal Court the order of the Court of Appeals for the Fifth Circuit and a petition for a temporary restraining order and injunction against further Mississippi State Court proceedings so that the issues between the parties could be tried in the previously instituted federal action. (R. 43-46).

Both parties attended a hearing on March 11 before the Oklahoma Federal Judge (R. 142ss-186ss) who then granted a temporary restraining order to maintain existing conditions until he could decide whether the Federal Court's jurisdiction should be protected by an injunction. The order restrained Hyde and its attorneys from proceeding with the Mississippi State Court action and provided for a $10,000 bond to protect Hyde against damages if it were later found to have been wrongfully restrained. (R. 46-47).

Hyde and its attorneys, including Respondent Dunn, refused to obey the order even though the Mississippi State Judge offered to postpone the trial. (R. 60 [finding 20]). The trial then proceeded and Hyde obtained a judgment of $464,450.08 in the Mississippi State Court.

After a hearing on March 14, 1964, the Oklahoma Federal Court entered findings and held Hyde and Dunn in civil contempt. (R. 61 [finding 25]). On September 1, 1964, the Court entered the Judgment and Order attached hereto as Appendix A (R. 82-87). In addition to certain costs, the judgment enjoined Hyde and its attorneys, until further order of the Court, from enforcing or collecting the Mississippi State Court judgment.

III. Review By the Court of Appeals

Upon appeal by Hyde, the Court of Appeals for the Tenth Circuit reversed, ruling that the Oklahoma Federal Court did not have jurisdiction over the subject matter of the lawsuit at the time it issued its restraining order. Contrary to the March 10th order of the Court of Appeals for the Fifth Circuit, it held that the Fifth Circuit did not have the power to constitute one of its orders a transfer under 28 U.S.C. §1651. In addition it held that a court of appeals had no power to transfer under 28 U.S.C. §§1404(a) and 1406(a) because those sections restricted such power to district courts. Finally, the Court of Appeals for the Tenth Circuit held that the case file must be physically received in the transferee court before that court acquires jurisdiction. (Appendix B, infra, page 17).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Prior Decisions of Other Courts of Appeals

The decision of the Court of Appeals for the Tenth Circuit conflicts with prior decisions of other courts of appeals in two ways. First, in this very same case and on the very same fact situation the Court of Appeals for the Fifth Circuit previously determined that it could effect an *instanter* transfer and in fact did order the *instanter* transfer of the action to the Oklahoma Federal Court.

The Court of Appeals for the Fifth Circuit, realizing that there would necessarily be a delay in physically transferring the file from Mississippi to Oklahoma, ordered that, pending the actual physical transfer of the record, its order should itself constitute a transfer on the

basis of which the parties could present the matters in issue to the Oklahoma Federal Court.*

The Court of Appeals for the Tenth Circuit has ruled exactly the opposite, i.e., that courts of appeals do not have such power and that the case file must be physically received before jurisdiction is present in the transferee court.

There is very little prior authority on the subject, yet clearly the Courts of Appeals for the Fifth and Tenth Circuits disagree as to the interpretation of Section 1651.

Second, in reversing the Court of Appeals for the Fifth Circuit's decision, the Court of Appeals for the Tenth Circuit cited no extraordinary circumstances demanding a different result. It is clearly the law in other circuits that, absent such extraordinary circumstances, a court of coordinate jurisdiction should not be reversed in the

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* "But since phases of the case are pending for imminent trial in the State Courts of Mississippi, and Koehring is of the view that it has a substantial basis for obtaining injunctive relief from the United States District Court for the Northern District of Oklahoma, we think that for the protection of the rights of all concerned, this order should, and hereby does, constitute the writ of mandamus. Accordingly, the District Judge is hereby ordered to vacate the order or orders of dismissal heretofore entered on February 24, 1964, and is further ordered to immediately transfer the cause to the District Court for the Northern District of Oklahoma. This Court having the power to construe its own orders and mandates also declares that the order of January 27, 1964, its original mandate and the order of February 5, 1964, denying the petition for rehearing all affirmatively recognize that either one, or both, or all of the parties shall have the right to apply to the District Court for the Northern District of Oklahoma to have the case transferred back to the Southern District of Mississippi because of alleged changed conditions. The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma . . . ." March 10, 1964 Order of United States Court of Appeals for the Fifth Circuit attached hereto as Appendix I.

same case. *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 810 (9th Cir., 1963); *Prack v. Weissinger*, 276 F.2d 446, 450 (4th Cir., 1960); *United States v. Wheeler*, 256 F.2d 745 (3rd Cir., 1958). These cases concerned the deference to be given the decision of one district judge by another, but the reasoning is directly applicable to courts of appeals.

II. The Case Presents Important Questions Which Should Be Settled By This Court

This case presents an opportunity for this Court to provide guidelines to the Courts of Appeals as to what powers they have when faced with the unusual case which demands an unusual remedy. If the decision of the Court of Appeals for the Tenth Circuit is sustained it means that the Court of Appeals for the Fifth Circuit was powerless to protect the rights of the parties before it by declaring an *instanter* transfer, even though it clearly felt that the action it took was necessary to protect such rights. This case would not only give an opportunity to set a guideline as to the scope of 28 U.S.C. §1651 but also as to the inherent powers of a court of appeals "to effectuate what seems . . . to be the manifest ends of justice." *United States v. Ritter*, 273 F.2d 30 (10th Cir., 1959). Clearly such guidelines are needed since two courts of appeals have reached exactly opposite decisions on the same facts and issues.

This case also presents an opportunity for this Court to outline the consideration to be given the decision of one Court of Appeals by another in the same case. The law is clear that one district judge should not overrule a prior decision of another district judge in the same case without some very good reason. This case presents

an opportunity for this Court to establish that rule as between courts of appeals.

This case is important to many future litigants, certainly to all litigants who must request some action or relief which has not been granted specifically in the past and which invokes the inherent power of the courts. It is also important to establish the proposition that future litigants, whose rights have been pronounced by one court of appeals, can rely on that ruling without concern that they may later in the same case be left without remedy because of a reversal by another court of appeals.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for certiorari should be granted.

Respectfully submitted,

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Dated September 18, 1965

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APPENDIX A

[*United States District Court, Northern District of Oklahoma*]

MEMORANDUM

The Court has for decision here the question of whether sanctions for civil contempt can be imposed against the plaintiff, Hyde Construction Co., and its attorney Vardaman S. Dunn.

Obtaining jurisdiction by attachment, plaintiff instituted this action in a United States District Court in Mississippi to recover a money judgment for breach of contract and for a declaratory judgment and injunction. The case has been transferred to this Court.

Plaintiff then brought suit in a Mississippi state court against the same defendant on the same cause of action and obtained jurisdiction by attachment.

Dalrymple Equipment Company was the resident attachment defendant in both actions.

A temporary restraining order was issued in this case restraining the parties from proceeding in the state court action. Hyde and its attorneys had notice of it. It and they proceeded with the state court trial over a period of some fifteen days and concluded the trial on March 26, 1964. During that period of time the restraining order was in force, and this Court had issued and served on Hyde and its attorneys an order to show cause why they should not be found in contempt.

On March 14th, the Court entered its findings that Hyde and its attorneys, Vardaman S. Dunn and Charles Clark, were in contempt, and took under advisement the matter of imposing sanctions. On April 9, 1964, Charles Clark was purged of civil contempt.

On March 27, 1964, this Court denied Koehring's application for preliminary injunction and the temporary restraining order as extended, expired by lapse of time.

A hearing has been held concerning the sanctions, if any, to be imposed for the civil contempt.

Hyde urges that upon denial of the application for a preliminary injunction all matters relating to civil contempt were terminated. Salvage Process Co. v. Acme Tank Cleaning Corp., 1936, 2 Cir. 86 F. 2d 727; Worden v. Searls, 1886, 121 U. S. 14, 30 L. Ed. 853; U. S. v. United Mine Workers, 1946, 330 U.S. 258, 294-5, 91 L. Ed. 884, 913.

In the last cited case, the Court's remarks as to obligation for compliance (p. 294) indicate that expiration of an order is not equivalent to reversal; the temporary restraining order and preliminary injunction there involved were sustained, not reversed and the language at pp. 294-5 as to the effect of reversal appears to be obiter dicta. In the other cases cited, the "basic action" was for injunctive relief, the preliminary injunction awarded some of that relief, and plaintiff lost its case on the merits. The contempt order thus was reversed upon and as a part of the adjudication in the basic action that plaintiff had no rights which were violated. See 121 U. S. at p. 25 and 86 F. 2d 725.

In the case at bar the temporary restraining order does not touch the merits. It was wholly ancillary and was designed to halt prosecution of the state court action at least until further inquiry could be made. It has not been set aside or reversed. The order denying the preliminary injunction did not affect it nor constitute a determination that it was improvidently entered. On the contrary, the findings and conclusions are that it was properly entered.

A major reason for denial of the temporary injunction was that the acts sought to be enjoined had already been committed. The authorities cited do not sustain the contention made. Compare Brougham v. Oceanic Steam Navigation Co., 1913, 2 Cir., 205 F. 857; Land v. Dollar, 1951, D.C. Cir., 190 F. 2d 366, cert. dismissed 344 U. S. 806, 97 L. Ed. 628; Blackwelder v. Crooks, D. C., D. C. 1957, 151 F. Supp. 26, 28, affirmed in part and reversed in part, 252 F. 2d 854; Cummings-Landau Machinery Co. v. Koplin, Ill. 1944, 54 N. E. 2d 462. These cases may not be precisely in point. Indeed, it may be that here is a case of first impression.

The verified petition for order to show cause and the order to show cause are a sufficient basis for this proceeding. The parties charged have filed no answer or other pleading denying nor have they otherwise denied violation of the temporary restraining order. The proof of violation is complete and sufficient. There is no fatal defect in the procedural aspects of the case. U. S. v. United Mine Workers of America, supra, 330 U.S. 258, 295-8, 91 L. Ed. 884, 914-15; National Labor Relations Board v. Tupelo Garment Co., 1941, 5 Cir., 122 F. 2d 603.

The respondents have elected to test the order by disobeying it. The law is clear as to the consequences of that course of action. The Court may impose sanctions to deprive the contemnors of the fruits of their contemptuous conduct, to restore the status quo as nearly as may be, to coerce obedience and to compensate the opposite party for loss caused by disobedience. "The measure of the court's power * * * is determined by the requirements of full remedial relief." McComb v. Jacksonville Paper Co., 1949, 336 U. S. 187, 193, 93 L. Ed. 599, 605. And see: Deeds v. Gilmer, 1934, Va., 174 S. E. 37; Keys v. Alligood, 1919, N. C., 100 S. E., 113; Parker v. U. S.,

1946, 1st Cir., 153 F. 2d, 66; U. S. v. Onan, 1951, 8 Cir., 190 F. 2d 1; Leman v. Krentler-Arnold Hinge Last Co., 1931, 284 U. S. 448, 76 L. Ed. 389; Toledo Scale Co. v. Computing Scale Co., 1923, 261 U. S. 399, 67 L. Ed. 719.

It is made to appear to this court that a Mississippi state court has enjoined Koehring Company from proceeding to trial of this case in this Court. Aside from evidence thereof, this and other Federal Courts may take judicial notice of such a proceeding. Wagner v. Fawcett Publications, 1962, 7 Cir., 307 F. 2nd 409. No decision concerning that injunction is here made, but Donovan v. Dallas, decided June 8, 1964, 377 U. S. 408, 12 L. Ed. 2d (Adv. Sheets) 409 is of interest. The conflict between courts has been brought about by events originating in respondents disobedience of the temporary restraining order of this court. It is hoped that there may be an orderly resolution of that conflict.

An order will be entered in accordance with the views expressed in this memorandum.

Allen E. Barrow
U. S. District Judge
Northern District of Oklahoma

Filed Sept. 1, 1964

JUDGMENT AND ORDER

On the 18th day of June, 1964, this cause came on for further hearing in the civil contempt proceeding against Hyde Construction Company, Inc., and Vardaman S. Dunn. Further evidence was heard. There were arguments by counsel and time was given for the filing of briefs pending which the matter was taken under advisement.

At this and previous hearings it is made to appear to the Court that in violation of the temporary restraining

order of this Court, Hyde Construction Company, Inc. and its attorney, Vardaman S. Dunn proceeded with and concluded the trial of Cause No. 60068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi, and continuing therewith to the rendition of a judgment therein on April 8, 1964 in favor of Hyde and against Koehring.

Now on this 1st day of September, 1964, It Is Ordered, Adjudged And Decreed by the Court

1. The trial of this case in this Court shall be had and conducted as if said Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi had not been tried and as if the judgment therein had not been rendered. Nevertheless, this Court may at any time consider the judgment in said Case No. 60,068 in making final disposition of the matters hereinafter set out and in rendition of its judgment herein.

2. Until the further order of this Court, the plaintiff, Hyde Construction Company, Inc., its officers, agents, servants, employees, assigns, attorneys, and/or any person or corporation acting in concert therewith, be and they hereby are enjoined and restrained from directly or indirectly enforcing or collecting or attempting to enforce or collect in any manner whatsoever any rights or claims under or by virtue of the decree entered under date of April 8, 1964, in said Cause No. 60,068, or any other decree, judgment, motion, action, process, execution, proceeding or order premised thereupon; but nevertheless the ones so restrained may participate in and contest any appeal from said judgment taken by Koehring Company.

3. Subsequent to the issuance of the temporary restraining order herein, Koehring Company has incurred

reasonable and necessary expense of $28,866.33 because of the acts of Hyde Construction Company, Inc. and Vardaman S. Dunn in violation of the temporary restraining order. Of this, $9,009.80 is the reasonable and necessary expense in connection with the institution and prosecution of the proceedings in this court concerning contempt, and $19,856.53 is the reasonable and necessary expense in connection with proceedings had in Mississippi arising out of the violation of this Court's temporary restraining order. It Is Therefore Ordered And Decreed by the Court that Hyde Construction Company, Inc. and Vardaman S. Dunn shall be jointly and severally liable for and shall pay to Koehring Company forthwith the said sum of $9,009.80. Whether or not they or either of them shall be required to pay any further sum or sums is reserved for decision until the trial of this case has been concluded in this Court or until the further order of this Court granted for any reason.

4. It Is Therefore Ordered And Decreed By The Court that judgment is hereby entered in the sum of $9,009.80 against Hyde Construction Company and Vardaman S. Dunn, jointly and severally, and in favor of Koehring Company to reimburse Koehring Company for expenses incurred in connection with the institution and prosecution of the civil contempt proceedings as hereinabove set forth.

5. Jurisdiction of this cause and of this proceeding is retained for all purposes, including the purpose of giving full effect to this order and the making of such further orders and decrees or taking such further action as may be necessary or appropriate.

Allen E. Barrow
United States District Judge

Filed Sept. 1, 1964

APPENDIX B

OPINION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

July Term 1965

HYDE CONSTRUCTION COMPANY, INC., Appellant,
vs.
KOEHRING COMPANY, Appellee.
No. 7929

VARDAMAN S. DUNN, Appellant,
vs.
KOEHRING COMPANY, Appellee.
No. 7930

Appeals from the United States District Court for the Northern District of Oklahoma

Charles Clark and David H. Sanders for Appellants.

William A. Denny and Maurice McSweeney (A. Morgan Brian, Jr. and Villard Martin, Jr., Of Counsel, were with them on the brief) for Appellee.

Before PICKETT, LEWIS and SETH, Circuit Judges.

LEWIS, Circuit Judge.

These appeals are taken from an order and decree[1] entered by the United States District Court for the Northern District of Oklahoma springing from a finding that appellants were in civil contempt for disregarding a temporary restraining order issued by the court. The restraining order had been directed to "Hyde Construction Company, Inc., its attorneys, agents, and all persons acting in concert therewith" and required them to cease and desist from proceeding with a civil action then pending in the Chancery Court of the First Judicial District of Hinds County, Mississippi. The appellant Dunn is a member of the bar of Mississippi and attorney for Hyde Construction Company. It is not disputed that appellants did disregard the court's order and, through the expedient of over-simplification, we state the present appellate issue to be a determination of the validity of the restraining order.

Appellant Hyde Construction Company was prime contractor on a construction project concerning the erec-

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[1] "Now on this 1st day of September, 1964, It Is Ordered, Adjudged and Decreed by the Court

1. The trial of this case in this Court shall be had and conducted as if said Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi had not been tried and as if the judgment therein had not been rendered. Nevertheless, this Court may at any time consider the judgment in said Case No. 60,068 in making final disposition of the matters hereinafter set out and in rendition of its judgment herein.

2. Until the further order of this Court, the plaintiff, Hyde Construction Company, Inc., its officers, agents, servants, employees, assigns, attorneys, and/or any person or corporation acting in concert therewith, be and they hereby are enjoined and restrained from directly or indirectly enforcing or collecting or attempting to enforce or collect in any manner whatsoever any rights or claims under or by virtue of the decree entered under date of April 8, 1964, in said Cause No. 60,068, or any other decree, judgment, motion, action, process, execution, proceeding or order premised thereupon; but nevertheless the ones so re-

tion of the Keystone Dam Spillway in the State of Oklahoma. It contracted with appellee Koehring Company for the latter to design and install a concrete plant for Hyde's use in the project. A dispute between the parties arose in reference to the performance of this contract, and on August 30, 1961 Hyde filed suit against Koehring in the Federal District Court for the Southern District of Mississippi, praying for writs of chancery attachment, injunctive relief, a declaratory judgment, and a money judgment of $500,000 for breach of the contract. Koehring contested the jurisdiction of that court, and in the alternative moved for a transfer of venue to the Federal District Court for the Northern District of Oklahoma pursuant to 28 U.S.C. §1404(a). Apparently unsure of the jurisdiction of the Mississippi federal court, Hyde on September 27, 1961 filed suit in the state chancery court on the same breach of contract action, obtaining jurisdiction by virtue of chancery attachments upon debt-

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[1](Continued)

strained may participate in and contest any appeal from said judgment taken by Koehring Company.

3. Subsequent to the issuance of the temporary restraining order herein, Koehring Company has incurred reasonable and necessary expense of $28,866.33 because of the acts of Hyde Construction Company, Inc. and Vardaman S. Dunn in violation of the temporary restraining order. Of this, $9,009.80 is the reasonable and necessary expense in connection with the institution and prosecution of the proceedings in this court concerning contempt, and $19,856.53 is the reasonable and necessary expense in connection with proceedings had in Mississippi arising out of the violation of this Court's temporary restraining order. It Is Therefore Ordered And Decreed by the Court that Hyde Construction Company, Inc. and Vardaman S. Dunn shall be jointly and severally liable for and shall pay to Koehring Company forthwith the said sum of $9,009.80. Whether or not they or either of them shall be required to pay any further sum or sums is reserved for decision until the trial of this case has been concluded in this Court or until the further order of this Court granted for any reason.

4. It Is Therefore Ordered And Decreed By The Court that judgment is hereby entered in the sum of $9,009.80 against Hyde Construction Company and Vardaman S. Dunn, jointly and severally, and in

ors of Koehring.[2] The suit was not actively prosecuted at that time pending the disposition of Koehring's contentions before the Mississippi federal court.

In July of 1962 the Mississippi federal court denied Koehring's motions for transfer but certified the ruling for interlocutory appeal under 28 U.S.C. §1292(b) to the United States Court of Appeals for the Fifth Circuit. On September 19, 1963 the Fifth Circuit reversed the federal district court on the venue question and remanded the case to the district court for transfer to the Oklahoma federal court under 28 U.S.C. §§1404(a) and 1406(a). Koehring Co. v. Hyde Construction Co., 324 F. 295. Hyde then petitioned the Fifth Circuit for rehearing, which stayed the order until that petition was denied on February 5, 1964. During this period the state court action was progressing toward trial, March 9, 1964 being set as a tentative date. On December 30, 1963, just prior to the Fifth Circuit decision on Hyde's petition for rehearing, Koehring petitioned that court to enjoin the state suit, which the Fifth Circuit on January 27, 1964 refused to do, without prejudice to Koehring's right to apply to the Oklahoma federal court for such relief.

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[1](Continued)

favor of Koehring Company to reimburse Koehring Company for expenses incurred in connection with the institution and prosecution of the civil contempt proceedings as hereinabove set forth.

5. Jurisdiction of this cause and of this proceeding is retained for all purposes, including the purpose of giving full effect to this order and the making of such further orders and decrees or taking such further action as may be necessary or appropriate."

[2]At the time these suits were commenced, Rule 4(e) Fed. R. Civ. P., had not yet been amended to permit the initiation of federal court actions through use of state attachment procedures. See Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 4, Fed. R. Civ. P. (Supp. 1964).

Hyde then filed in the Mississippi federal district court, on remand, a motion to consider changed circumstances and not transfer the case to Oklahoma; in the alternative, Hyde sought voluntary dismissal of that action in accordance with Rule 41(a)(1) of the Federal Rules of Civil Procedure. Up to this time Koehring had not yet filed an answer on the merits but did so on February 20 pending the decision. On February 24, 1964, the Mississippi federal district court denied Hyde's motion in reference to the transfer issue but granted the motion for voluntary dismissal without prejudice, reasoning that the case had not yet been transferred to Oklahoma and that Rule 41(a)(1) allowed dismissal upon plaintiff's motion at any time before the filing of an answer.

On March 6, 1964 Koehring obtained ex parte from the Fifth Circuit a temporary restraining order prohibiting Hyde from further action in the state court suit pending determination of a writ of mandamus which had been filed by Koehring in the Fifth Circuit on March 4, petitioning that court of appeals to direct the Mississippi federal court to vacate its decision dismissing the action. The mandamus application was heard on March 10, and on that same afternoon the Fifth Circuit rendered its decision in Koehring's favor, vacating the Mississippi federal court's decision dismissing the action[3] and ordering the Mississippi federal judge to transfer the action. The order further stated that:

> "The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma,

[3]Appellants urge us to redecide the question of Hyde's right to dismissal, contending that this court is not bound by the Fifth Circuit determination. We see no necessity for inquiry into such issue for it is only the fact of the decision that is pertinent to our present determination.

this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma." (Emphasis supplied.)

The order was concluded by the Fifth Circuit's vacating its temporary restraining order against Hyde's proceeding in the state court action because "the issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this Court." Meanwhile, trial in the state court action had been set for the next day, March 11, at 2:00 p.m.

At 9:45 a.m. the next day, March 11, counsel for Koehring presented to the Oklahoma federal court a certified copy of the Fifth Circuit's order together with a motion for an injunction and a temporary restraining order forbidding further proceedings in the state court suit, which was to begin trial later that same day. Both Hyde and Koehring were represented by counsel before the Oklahoma court and argued the merits of the injunction and restraining order, and just before 2:00 p.m., when the Mississippi trial was to begin, the temporary restraining order was granted to preserve existing conditions pending a decision on the jurisdiction of the Oklahoma federal court and the propriety of Koehring's motion for an injunction.[4] The news of this order reached Hyde's attorneys in Mississippi, including appellant Dunn, that same afternoon but they declined to obey it and continued on with the trial of the suit[5] until its conclusion on about March 25, when Hyde was awarded a judgment of over $486,000.

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[4]Koehring's motion for a "preliminary" injunction staying Hyde from proceeding in Mississippi was ultimately denied on April 9, 1964 after a full hearing. Among the reasons given by the court for denying the injunction was that "the state court trial has now been completed and therefore much of the initial problem and urgency for Koehring is now moot."

[5]The Mississippi state court on March 12 ordered the state trial to proceed.

On March 12 Koehring petitioned the court below to cite Hyde and Dunn for contempt; the court issued an order to Hyde and its attorneys to show cause on March 14 why they should not be found in contempt. At the hearing Hyde's counsel appeared but briefly and Dunn did not appear at all, but the court nevertheless entered findings and held Hyde and Dunn in civil contempt.[6] Thereafter, on September 1, 1964, the court entered the judgment noted (Note 1, supra) and from which this appeal is taken.[7]

At the outset we are faced with the question of our own jurisdiction to review the September 1 order. Normally, a judgment for civil contempt against a party is not reviewable on appeal from that judgment but only on appeal from a final judgment in the related action. Fox v. Capital Co., 299 U.S. 105; Duell v. Duell, D.C. Cir., 178 F_2 683, 687; Taylor v. Bowles, 9 Cir., 152 F_2 311. However, a judgment for civil contempt against a non-party, such as Dunn, can support an appeal without dependence upon the related action if the judgment of contempt is, itself, final. Bessette v. W. B. Conkey Co., 194 U.S. 324; In re Manufacturers Trading Corp., 6 Cir., 194 F_2 948; Fenton v. Welling, 9 Cir. 139 F_2 608; 6 Moore's Federal Practice, ¶ 54.17 at p. 154. And

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[6]Appellant Dunn was also found to be in criminal contempt and a warrant of arrest issued March 14. The Mississippi state court issued an order purporting to restrain any U.S. Marshal from making the arrest until the state trial, then in progress, was completed. The arrest was made on March 16 and Dunn was immediately released from restraint by writ of habeas corpus issued by the United States District Court for the Southern District of Mississippi. This action is now pending upon appeal as No. 22081 in the Fifth Circuit.

[7]The court's order is clear to the effect that the injunction preventing collection of the Mississippi judgment is wholly dependent upon the findings and conclusions relative to the contempt judgment and must stand or fall with it.

here the problem is compounded by the question of whether a final judgment of contempt has ever been entered since the district court reserved its decision as to whether appellants will be required to pay further sums. However, 28 U.S.C. §1292(a)(1) gives jurisdiction to courts of appeals on appeals from interlocutory orders of the district courts "granting * * * refusing or dissolving injunctions * * *," and in this case the district court enjoined appellants from enforcing the state court judgment. Since the injunction is inseparable from the contempt orders, whose validity in turn depends upon the jurisdiction of the lower court, this court may and will review the entire order of September 1, 1964. Cf. Stewart-Warner Corp. v. Westinghouse Electric Corp., 2 Cir., 325 F. 822, cert. denied, 376 U.S. 944.

As argued by the parties, this case presents a myriad of complex issues, particularly the jurisdiction of a district court to determine its own jurisdiction and the power of a federal court to enjoin a state court action under exceptions to 28 U.S.C. §2283.[8] Initially, Koehring claims that the contempt rulings were correct regardless of whether the district court had jurisdiction over the parties and over the subject matter under the doctrine that a court has jurisdiction to determine its own jurisdiction except in cases of "plain usurpation" clearly not here applicable. Since a court has such jurisdiction, it has power to punish for violations of orders entered pursuant to it. Therefore, argues Koehring, the contempt orders must be affirmed regardless of the court's ultimate jurisdiction over the case.

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[8]Section 2283.

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

This position of Koehring overlooks the fact that it was civil contempt for which Hyde and Dunn were cited. While a court has the power to punish for criminal contempt for actions that are an affront to its dignity, even if the violation was of an order that was incorrectly entered, civil contempt is remedial and accrues to the benefit of the opposing party who has no claim to reimbursement for offenses solely against the court. As the Court stated in United States v. United Mine Workers, 330 U.S. 258, 295, respecting civil contempt: "The right to remedial relief falls with an injunction which events prove was erroneously issued, * * * and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court." And see Heasley v. United States, 8 Cir., 312 F. 641, 648-49; Cliett v. Hammonds, 5 Cir., 305 F. 565, 570. Thus, the correctness of the contempt orders is dependent upon the jurisdiction of the district court, and the contempt orders must fall if that court's actions were beyond its statutory power.

The only method by which the district court could have acquired jurisdiction below was by way of transfer of the action originally filed in the Mississippi federal court. And since the Mississippi court did not transfer the papers until March 16, subsequent to the entering of the subject restraining order, the court below did not obtain jurisdiction prior to March 16, under normal procedures, since the transfer of the papers, etc., to the transferee court is considered essential to that court's acquiring jurisdiction. See, *e.g.,* Drabnik v. Murphy, 2 Cir., 246 F. 408; Wright on Federal Courts, p. 143. The court below, therefore could obtain jurisdiction only if the Fifth Circuit's order, by itself, constituted a transfer, which that court clearly did intend it to be. But the transfer statutes, 28 U.S.C. §§ 1404 and 1406, both specify

that only the "district court" may transfer, and it is basic that the appellate jurisdiction of all inferior federal courts is wholly dependent upon statute. Carroll v. United States, 354 U.S. 394. Koehring, not disputing these general principles, nevertheless argues that the Fifth Circuit had the power to "constitute" its order a transfer by virtue of 28 U.S.C. § 1651, the "All-Writs" statute authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." It is not apparent which particular "writ"[9] was issued by that court nor that the order was necessary or appropriate in aid of its own jurisdiction or judgment. But it is clear that the Fifth Circuit was attempting to accomplish something it normally would be powerless to do, for a transfer must, according to statute, be made by the district court, *and* it is not effective until the papers have been transferred. The Supreme Court recently stated that "extraordinary writs are 'reserved for really extraordinary causes,' * * * and then only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240, 245. Section 1651 "does not contain a new grant of judicial power," United States *ex rel.* Wisconsin v. First Fed. Sav. & Loan Ass'n, 7 Cir., 248 F. 804, 809;

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[9]The Fifth Circuit order was a writ of mandamus specifically directed to the district judge and clerk except as to that portion of the order which stated the order to be self-executing. The function of the district court in obeying a mandate of the Court of Appeals is, of course, ministerial. Bastian v. Erickson, 10 Cir., 114 F. 338. The Mississippi district court did not *refuse* to obey the original mandate of transfer ordered by the court of appeals but affirmatively indicated his willingness to do so. His action in granting Hyde's motion to dismiss the case instead of effectuating the original mandate for transfer to Oklahoma was, as the Fifth Circuit specifically held, no more than error. The district court promptly obeyed the writ of mandamus.

cf. Huddleston v. Dwyer, 10 Cir., 145 F. 311, 315. With all deference, we hold that the Fifth Circuit was powerless to "constitute" one of its orders a transfer and that the Oklahoma district court did not obtain jurisdiction by virtue of such order. It follows that the district court had no jurisdiction to issue its original restraining order nor to punish appellants for not complying with the order.

The injunction and the contempt judgments are vacated and the cases are remanded for proceedings consistent with this opinion. Other contentions made on these appeals are either not properly before this court or are found to be without merit.

APPENDIX C

[*United States Court of Appeals, Tenth Circuit*]

JUDGMENT

Seventh Day, July Term, Wednesday, July 21st, 1965

Before Honorable John C. Pickett, Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges.

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the injunction and the contempt judgments are vacated and the cases are remanded for proceedings consistent with the opinion of the court. Other contentions made on these appeals are either not properly before this court or are found to be without merit. It is further ordered that Hyde Construction Company, Inc., and Vardaman S. Dunn, appellants, have and recover of and from Koehring Company, appellee, their costs herein and have execution therefor.

APPENDIX D

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 7929

HYDE CONSTRUCTION COMPANY, INC.,

Appellant,

vs.

KOEHRING COMPANY,

Appellee

No. 7930

VARDAMAN S. DUNN,

Appellant,

vs.

KOEHRING COMPANY,

Appellee.

APPELLEE'S PETITION FOR REHEARING

The Appellee, Koehring Company, a corporation, presents this Petition for Rehearing in the above entitled matter, and in support of this Petition respectfully shows to the Court:

On July 21, 1965, this Court entered its opinion vacating the injunction and contempt judgments and remanding for further proceedings. The opinion holds that only a district court may transfer a cause of action, that it is not transferred until the court papers are physically conveyed, that the Court of Appeals for the Fifth Circuit did not have the power to transfer a cause of action by its own order, and that therefore the Lower Court did

not have jurisdiction when it issued the temporary restraining order on March 11, 1964. A reading of the opinion indicates that the Appellee may have failed to make clear its contention that the Lower Court did have jurisdiction over the parties who appeared before it, made general appearances and fully participated in oral argument.

I.

THE FIFTH CIRCUIT SHOULD BE OVERRULED ONLY IF THERE WERE EXTRAORDINARY CIRCUMSTANCES DEMANDING IT. NO SUCH CIRCUMSTANCES WERE PRESENT HERE.

There are no extraordinary circumstances in this case which require that the decision of the Fifth Circuit be overruled. It is clearly the rule that, absent extraordinary circumstances, the prior decision of a court of coordinate jurisdiction should not be overruled by a district court. *Prack v. Weissinger,* 276 F2d 446, 450 (4th Cir. 1960); *U. S. v. Wheeler,* 256 F2d 745 (3rd Cir. 1958). That reasoning is directly analogous to the present fact situation.

There are in fact some extraordinary circumstances present in this case, but those circumstances strenuously demand that the Fifth Circuit's decision be accepted and honored by this Court, even if this Court does not fully agree with its action.

On March 6, 1964, the Fifth Circuit issued an injunction restraining the parties from proceeding with the state court action in order to protect Koehring's rights .R. 138ss) On March 10, 1964, the Fifth Circuit transferred the case and ordered the Mississippi Federal District

Court to mail the record to the Federal District Court for the Northern District of Oklahoma. (R. 25) [For the convenience of the Court the orders of March 6 and 10 have been printed herein as exhibits A and B respectively.] But, knowing that the record would not arrive in Oklahoma before the Mississippi State Court case began the next day, the Fifth Circuit also stated:

> "The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma." (R. 25)

Then, considering that jurisdiction had been effectively transferred to the Northern District of Oklahoma, the Fifth Circuit dissolved its injunction against further proceedings in the state court action. The Court specifically stated:

> "The issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this Court and the temporary restraining order heretofore issued is no longer necessary or appropriate in aid of its jurisdiction, and such injunction and restraining order is vacated." (R. 25)

By this order, the Fifth Circuit ceased its protection of the parties, assuming that the Northern District of Oklahoma would immediately accept jurisdiction and continue the protection of the parties. The Northern District of Oklahoma did accept that jurisdiction, the parties generally appeared before it, motions were made by both parties, and orders were issued by the Court. This Court's ruling that no jurisdiction existed in the Northern District of Oklahoma until the papers physi-

cally arrived on March 16, coupled with the Fifth Circuit's determination that its jurisdiction had ended on March 10, has created a jurisdictional limbo.

Appellee obviously cannot obtain any effective relief from the Fifth Circuit at this date, even if the Fifth Circuit were willing to change its ruling and accept this Court's ruling as to the time of transfer. The result would be, if this decision stands, that Appellee, caught between conflicting circuits, has been denied a court to whom it can turn for protection.

II.

THE COURT'S RULING THAT §1651 DOES NOT AUTHORIZE INSTANTER TRANSFER IF JUSTICE SO REQUIRES IS INCONSISTENT WITH ITS OWN PRIOR DECISIONS.

The Tenth Circuit has clearly decided that a circuit court itself has the power and duty to order the transfer of an action from one judge to another within the same district under authority of "the all-writ statute or in the exercise of inherent powers of appellate jurisdiction to effectuate ... . the manifest ends of justice." *United States v. Ritter*, 273 F2d 30 (10th Cir. 1959). The *Ritter* case has been approved by the Ninth Circuit. *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F2d 804 (9th Cir. 1963). That court also cited 28 USC §2106.

While *Ritter* involves an intra district transfer, there is no essential difference between the *power* of an appellate court to transfer an action from one district to another and the *power* to transfer from one judge to another within a district.

28 USC §1404 does not limit this power. It merely authorizes a district court to do that which an appellate court could have done under §1651 or through its inherent powers of appellate jurisdiction.

Here, on March 10, 1964 the Court of Appeals for the Fifth Circuit formally declared on the record that the action was transferred as of that date to the Northern District of Oklahoma. (R. 25) Nothing remained to be done by the District Court in Mississippi but perform the ministerial act of physically mailing the record. The transfer had already been effected.

The Tenth Circuit has held that the function of a district court in obeying a mandate is purely ministerial. *Bastian v. Erickson,* 114 F2d 338 (10th Cir. 1940). Thus, it has already been recognized by this Court that it is effectively the order of the *appellate* and not the district court which is carried out upon a mandate.

III.

DRABIK V. MURPHY DOES NOT HOLD THAT PHYSICAL POSSESSION OF THE COURT PAPERS IS NECESSARY TO ACQUIRE JURISDICTION.

The court in *Drabik v. Murphy,* 246 F2d 408 (2nd Cir. 1957), cited in the opinion of this Court, simply held that once the court papers have arrived in the transferee court, the transferring court no longer has jurisdiction. It said nothing about, nor does it intimate, that jurisdiction *cannot* be acquired prior to physical receipt of the court papers where the transferring court has expressly ordered that receipt not be necessary.

IV.

28 U. S. C. §§1404(a) and 1406 DO NOT RESTRICT THE TRANSFER POWER TO DISTRICT COURTS.

The Court's conclusion that *only* the Lower Federal Court in Mississippi — not the Fifth Circuit too — had the power to order [and *de jure* effect] a valid transfer is predicated on an unjustified and improper statutory interpretation. In its opinion, this Court states that "the transfer statutes, 28 U.S.C. §§1404 and 1406, both specify that *only* the 'district court' may transfer" (p. 13, emphasis added). Yet the exclusive term, "only", is not used at all in those statutes. Section 1404(a), for example, merely provides that "a district court may transfer", nothing else. It does *not* say, nor even imply, that *only* a district court may transfer, or that appellate courts may *not* also transfer. These transfer statutes do not purport to have anything at all to do with the power and authority of federal appellate courts, [much less with their power and authority to effect the *substance* of a transfer, especially when it is collateral] to implement one or more of their statutorily authorized extraordinary writs in a compelling situation (like this one) where justice for the moving party can be served only by meeting the extreme urgency and close timing of the exigencies presented.

Clearly, therefore, the Court has interpreted the statute narrowly. Yet narrow construction of Section 1404(a) should not be applied. It is a remedial statute, *Ex Parte Collett,* 337 U.S. 55, 71 (1949), and should be broadly interpreted.

V.

THE RECORD IN THIS CASE SHOWS THAT APPELLANTS DISOBEYED AN ORDER OF THE LOWER COURT ISSUED AFTER PHYSICAL RECEIPT OF THE CASE FILE.

On March 16, 1964, the record physically arrived in the Northern District of Oklahoma. Shortly thereafter, on March 20, 1964, the Lower Court held a full hearing on the motion for an injunction and extended the Temporary Restraining Order for a period of six days. (R. 54). Even if this Court continues to hold that the Lower Court did not have jurisdiction until the papers were physically transferred, there can be no doubt that the Northern District of Oklahoma had jurisdiction when it issued its order on March 20, 1964. Appellants continued to violate the order thereafter, as set forth in the Lower Court's findings on April 9, 1964. (R. 60-61).

Since the record is clear that the Lower Court had jurisdiction when it issued its order of March 20, and since disobedience continued thereafter, there can be no doubt that the Appellants here violated an order of a Court fully possessed of jurisdiction.

CONCLUSION

For the foregoing reasons Appellee's Petition for Rehearing and reargument should be granted.

Further, in view of the conflict between this Court and the Court of Appeals for the Fifth Circuit, the Court may wish to have rehearing and reargument before the Court en banc.

Respectfully submitted,

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MAURICE J. McSWEENEY
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Milwaukee, Wisconsin

CERTIFICATE OF COUNSEL

Appellee, by its attorneys, hereby certifies that the foregoing Petition for Rehearing is not presented for the purpose of vexation and delay, but is, in the opinion of counsel, well founded in law and proper to be filed herein.

WILLIAM A. DENNY
Attorney for Appellee

EXHIBIT A

[U. S. Court of Appeals, FILED, Mar. 6, 1964,
Edward W. Wadsworth, Clerk]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21333

KOEHRING COMPANY (including its Division C. S. JOHNSON COMPANY),
Petitioner

vs.

HYDE CONSTRUCTION COMPANY, INC.
and
HONORABLE S. C. MIZE, United States District Judge for the Southern District of Mississippi,
Respondents

NO. 19819

KOEHRING COMPANY, ET AL.,
Appellants

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Appellee.

Before CAMERON, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

This is an application for mandamus and other appropriate relief referred by the Court to this panel. The papers show without contradiction that in our opinion

September 19, 1963, in No. 19819 and the mandate issued thereon, this Court ordered:

> "The cause is remanded with instructions that it be transferred to the Northern District of Oklahoma."

On February 5, 1964, Petition for Rehearing was denied. On January 27, 1964, the Appellant's motion for injunction was denied but "without prejudice to appellant's right to apply to the District Court to which the case was remanded [Northern District of Oklahoma] for transfer back." Nevertheless, Respondent District Judge, Southern District of Mississippi, on February 24, 1964, on application of the plaintiffs-appellees (Hyde) purported to dismiss the case without prejudice under F.R.Civ.P. 41 (a) (1). With the case dismissed, the plaintiffs (Hyde) thereupon proposes to try the State Court suit beginning March 9, 1964. As this action of the District Court raises substantial questions whether further orders are necessary or appropriate in aid of the jurisdiction of this Court, 28 USCA §1651, or "necessary in aid of its jurisdiction, or to protect or effectuate its judgment, 28 USCA §2283, it is ORDERED that the parties show cause within ten days (see Rule 13(a) (b) (c) of this Court) why a writ of mandamus or other appropriate orders should not be issued and that pending determination of such matters, the parties are enjoined and restrained from proceeding with the case in the State Court.

Judge Cameron did not participate in this Order.

ENTER:

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit
By G. F. Garwihear
Deputy

New Orleans, Louisiana
Mar. 6, 1964

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21333

KOEHRING COMPANY (including its Division C. S. JOHNSON COMPANY),
Petitioner

vs.

HYDE CONSTRUCTION COMPANY, INC.
and
HONORABLE S. C. MIZE, United States District Judge for the Southern District of Mississippi,
Respondents

NO. 19819

KOEHRING COMPANY, ET AL.,
Appellants

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Appellee.

Before CAMERON, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

Immediately after the issuance of this Court's order on Friday, March 6, 1964, Hyde Construction Company, Inc. requested opportunity to be heard immediately. Written response directed to that part of our order re-

straining the State Court proceeding was thereupon filed. This response and the oral presentation before a member of this panel covers all available arguments in support of the District Judge's order of dismissal and consequent absence of an order of transfer to Oklahoma. The District Judge has made full response in which he files formal assurances that the orders of this Court will be promptly executed. This response in brief shows that the District Judge was of the opinion that, entirely consistent with our mandate, there being no answer yet filed, the Plaintiff Hyde had the unqualified right of dismissal or notice under F.R.Civ.P. 41(a)(1). On the oral presentation Tuesday, March 10, 1964, this Court was informed that subsequent to the Plaintiff's alternative motions (Parts A and B) filed on February 15, 1964, the Defendant Koehring Company served its answer on counsel for Hyde, F.R.Civ.P. 5(a)(b), the formal filing thereof under Subparagraph (d) not having been physically accomplished pending entry of an order by the District Court transferring the case to Oklahoma. There being no substantial dispute about this fact, we are of the clear view that the Plaintiff did not have the unqualified right to dismissal under F.R.Civ.P. 41(a)(1) and in view of our mandate, the District Court did not have the power or right to entertain a motion on terms or conditions. The Plaintiff's motion (Part B) did not have the effect of a "filing [of] a notice of dismissal" as of the date it was filed since it was not then a notice of dismissal, but was conditioned on adverse determination of Part A of its motion.

The result is that the District Judge was in error in undertaking to permit dismissal and in declining to order immediate transfer of the cause to the Northern District of Oklahoma as required by our prior mandate and or-

ders. In view of the District Judge's expressed willingness to carry out our orders, we would not ordinarily enter a writ of mandamus. But since phases of the case are pending for imminent trial in the State Courts of Mississippi, and Koehring is of the view that it has a substantial basis for obtaining injunctive relief from the United States District Court for the Northern District of Oklahoma, we think that for the protection of the rights of all concerned, this order should, and hereby does, constitute the writ of mandamus. Accordingly, the District Judge is hereby ordered to vacate the order or orders of dismissal heretofore entered on February 24, 1964, and is further ordered to immediately transfer the cause to the District Court for the Northern District of Oklahoma. This Court having the power to construe its own orders and mandates also declares that the order of January 27, 1964, its original mandate and the order of February 5, 1964, denying the petition for rehearing all affirmatively recognize that either one, or both, or all of the parties shall have the right to apply to the District Court for the Northern District of Oklahoma to have the case transferred back to the Southern District of Mississippi because of alleged changed conditions. The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma.

The issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this Court and the temporary restraining order heretofore issued is no

longer necessary or appropriate in aid of its jurisdiction, and such injunction and restraining order is vacated.

Judge Cameron was not available to participate in this order.

ENTER:

I CERTIFY THIS IS A TRUE COPY

/s/ John R. Brown
JOHN R. BROWN
UNITED STATES CIRCUIT JUDGE

March 10, 1964

APPENDIX E

Order denying appellee's petition for rehearing Second Day, August Term, Tuesday, August 17th, 1965.

Before Honorable John C. Pickett, Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges.

These causes came on to be heard on the petition of appellees for a rehearing herein and were submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

APPENDIX F

By order of August 24, 1965, the mandate of the United States Court of Appeals was stayed for a period of thirty days under provision of paragraph 3 of rule 28 of said court.

APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19819

KOEHRING COMPANY, ET AL.,
Appellants,

versus

HYDE CONSTRUCTION COMPANY, INC.,
Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(September 19, 1963.)

Before CAMERON, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: This case concerns the transfer of a cause to another district, under 28 U.S.C.A. 1404(a).

Hyde Construction Company, a Mississippi company, brought suit in a federal district court in Mississippi against Koehring Company, a Wisconsin corporation, and C. S. Johnson Company, a division of Koehring. Hyde alleged that Koehring agreed to construct a concrete cooling and mixing plant at the job site of a spillway at Keystone Dam on the Arkansas River in Oklahoma, and that the plant, as built, did not meet

the minimum operational standards agreed on in the contract between the parties. Koehring moved to dismiss on the ground that the court lacked jurisdiction since it was not "doing business" in Mississippi within the meaning of that state's statutes. Alternatively, it asked the district judge to transfer the cause to the Northern District of Oklahoma, where the alleged breach of contract took place and where its own action against the plaintiff was then pending. The trial judge denied both motions.

We do not reach the jurisdictional question for we hold that the case should be transferred under 28 U.S.C.A. 1404(a) to the Northern District of Oklahoma.

I.

Section 1404(a), Title 28 U.S.C.A., states the criteria to be considered in a motion for change of venue:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

These criteria have been spelled out in *Gulf Oil Corp. v. Gilbert,* 1947, 330 U. S. 501, 67 S.Ct. 839, 91 L. Ed. 1055. In that case the Supreme Court said:

> "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. . . ."

Advantage and convenience to the litigants themselves are not the only important considerations, however. The Supreme Court went on to point out that

> "factors of public interest also have place in applying the doctrine. Administrative difficulties follow for court when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not too be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, though, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws and in law foreign to itself."

Many of the elements mentioned in *Gulf Oil* as important are present here. The concrete cooling and mixing plant here in question was installed in Oklahoma; all relevant facts concerning its alleged failure to perform occurred in Oklahoma; if, in view of the complexity of its operation, an on-site inspection of the plant is necessary, it can be had only in Oklahoma. Most of the witnesses to the alleged failure of performance reside at or near the plant site, and the records of the U. S. Corps of Engineers dealing with the functioning of the plant are kept in Tulsa. Moreover, the docket in the Southern District of Mississippi is extremely congested, while that of the federal district court in the Northern District of Oklahoma is relatively current. Thus, every factor points to Oklahoma as the most logical forum for this action, where-

as the only connection which Mississippi has with this case is that one party to this suit resides there.

This case is similar to *Chicago, Rock Island & Pacific Railroad Co. v. Igoe*, 7 Cir. 1955, 220 F.2d 299. There the court pointed out that if "convenience of the parties" were the sole criterion, the refusal of the trial judge to transfer under Section 1404(a) could be sustained, since the plaintiff did in fact live in the district where suit was brought. There were, however, other statutory criteria to be considered. The Court stated:

> "As to the second test, 'convenience of witnesses,' it is self-evident that the convenience of both plaintiff's and defendant's witnesses would be served by a trial of the cause in the Southern District of Iowa. A number of witnesses reside at Avoca which is 459 miles from Chicago but only 33 miles from Council Bluffs and 104 miles from Des Moines, the two cities where the trial might be held.... There is nothing in this record to indicate the convenience of witnesses will be served by a trial in Chicago."

The Seventh Circuit then went on to discuss the "interest of justice", which it felt should be given paramount consideration: "In the interest of justice there should be considered the relative ease of access to sources of proofs; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; the possibility of a view of the premises; and the state of the court calendar both in the District where the case is pending, and in the District to which it is sought to have the case transferred." The Court concluded that in these circumstances it was warranted in ordering the cause transferred to the proper forum. The same factors obtain here, and we have reached the same conclusion.

II.

The Supreme Court in the recent case of *Goldlawr, Inc. v. Heiman,* 1962, 369 U.S. 463, 82 S.Ct. 913, 8 L. Ed. 2d 39 has held that a court may transfer an action under 28 U.S.C.A. 1406(a) even though it lacks jurisdiction over the person. That section provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Construing this statute, the Supreme Court stated:

> "The language of §1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendant or not. The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years—that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits. When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, Congress, by the enactment of §1406(a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized at 'time-consuming and justice-defeating technicalities.' It would at least partially frustrate

this enlightened congressional objective to import ambiguities into §1406(a) which do not exist in the language Congress used to achieve the procedural reform it desired."

The same considerations of convenience and procedural reform which prompted the enactment of Section 1406(a) apply to Section 1404(a), and there is no basis for distinguishing between them insofar as the rule enunciated in *Goldlawr* is concerned. See 1 Moore, Federal Practice para. o.146[5] at 1097 (2d Ed. 1951); 61 Mich. L. Rev. 393 (1962); 1963 Duke L. J. 168. Thus, whether or not the trial court below had personal jurisdiction over the defendant, for "the convenience of parties and witnesses" and "in the interest of justice" the cause should be transferred to Oklahoma.

The cause is REMANDED with instructions that it be transferred to the Northern District of Oklahoma.

APPENDIX H

[U. S. Court of Appeals, FILED, Mar. 6, 1964, Edward W. Wadsworth, Clerk]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21333

KOEHRING COMPANY (including its Division C. S. JOHNSON COMPANY), Petitioner

vs.

HYDE CONSTRUCTION COMPANY, INC. and HONORABLE S. C. MIZE, United States District Judge for the Southern District of Mississippi, Respondents

NO. 19819

KOEHRING COMPANY, ET AL., Appellants

vs.

HYDE CONSTRUCTION COMPANY, INC., Appellee.

Before CAMERON, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

This is an application for mandamus and other appropriate relief referred by the Court to this panel. The papers show without contradiction that in our opinion September 19, 1963, in No. 19819 and the mandate issued thereon, this Court ordered:

> "The cause is remanded with instructions that it be transferred to the Northern District of Oklahoma."

On February 5, 1964, Petition for Rehearing was denied. On January 27, 1964, the Appellant's motion for injunction was denied but "without prejudice to appellant's right to apply to the District Court to which the case was remanded [Northern District of Oklahoma] for transfer back." Nevertheless, Respondent District Judge, Southern District of Mississippi, on February 24, 1964, on application of the plaintiffs-appellees (Hyde) purported to dismiss the case without prejudice under F.R.Civ.P. 41(a)(1). With the case dismissed, the plaintiffs (Hyde) thereupon proposes to try the State Court suit beginning March 9, 1964. As this action of the District Court raises substantial questions whether further orders are necessary or appropriate in aid of the jurisdiction of this Court, 28 USCA §1651, or "necessary in aid of its jurisdiction, or to protect or effectuate its judgment, 28 USCA §2283, it is ORDERED that the parties show cause within ten days (see Rule 13(a)(b)(c) of this Court) why a writ of mandamus or other appropriate orders should not be issued and that pending determination of such matters, the parties are enjoined and restrained from proceeding with the case in the State Court.

Judge Cameron did not participate in this Order.

ENTER:

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By G. F. Garwihear
Deputy

New Orleans, Louisiana
Mar. 6, 1964

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21333

KOEHRING COMPANY (including its Division C. S. JOHNSON COMPANY), Petitioner

vs.

HYDE CONSTRUCTION COMPANY, INC.
and
HONORABLE S. C. MIZE, United States District Judge for the Southern District of Mississippi, Respondents

NO. 19819

KOEHRING COMPANY, ET AL., Appellants

vs.

HYDE CONSTRUCTION COMPANY, INC., Appellee.

Before CAMERON, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

Immediately after the issuance of this Court's order on Friday, March 6, 1964, Hyde Construction Company, Inc. requested opportunity to be heard immediately. Written response directed to that part of our order restraining the State Court proceeding was thereupon filed. This response and the oral presentation before a member of this panel covers all available arguments in support of the District Judge's order of dismissal and consequent absence of an order to transfer to Oklahoma. The District Judge has made full response in which he files formal assurances that the orders of this Court will be promptly executed. This response in brief shows that the

District Judge was of the opinion that, entirely consistent with our mandate, there being no answer yet filed, the Plaintiff Hyde had the unqualified right of dismissal or notice under F.R.Civ.P. 41(a)(1). On the oral presentation Tuesday, March 10, 1964, this Court was informed that subsequent to the Plaintiff's alternative motions (Parts A and B) filed on February 15, 1964, the Defendant Koehring Company served its answer on counsel for Hyde, F.R.Civ.P. 5(a)(b), the formal filing thereof under Subparagraph (d) not having been physically accomplished pending entry of an order by the District Court transferring the case to Oklahoma. There being no substantial dispute about this fact, we are of the clear view that the Plaintiff did not have the unqualified right to dismissal under F.R.Civ.P. 41(a)(1) and in view of our mandate, the District Court did not have the power or right to entertain a motion on terms or conditions. The Plaintiff's motion (Part B) did not have the effect of a "filing [of] a notice of dismissal" as of the date it was filed since it was not then a notice of dismissal, but was conditioned on adverse determination of Part A of its motion.

The result is that the District Judge was in error in undertaking to permit dismissal and in declining to order immediate transfer of the cause to the Northern District of Oklahoma as required by our prior mandate and orders. In view of the District Judge's expressed willingness to carry out our orders, we would not ordinarily enter a writ of mandamus. But since phases of the case are pending for imminent trial in the State Courts of Mississippi, and Koehring is of the view that it has a substantial basis for obtaining injunctive relief from the United States District Court for the Northern District of Oklahoma, we think that for the protection of the rights of all concerned, this order should, and hereby does, constitute

the writ of mandamus. Accordingly, the District Judge is hereby ordered to vacate the order or orders of dismissal heretofore entered on February 24, 1964, and is further ordered to immediately transfer the cause to the District Court for the Northern District of Oklahoma. This Court having the power to construe its own orders and mandates also declares that the order of January 27, 1964, its original mandate and the order of February 5, 1964, denying the petition for rehearing all affirmatively recognize that either one, or both, or all of the parties shall have the right to apply to the District Court for the Northern District of Oklahoma to have the case transferred back to the Southern District of Mississippi because of alleged changed conditions. The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma.

The issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this Court and the temporary restraining order heretofore issued is no longer necessary or appropriate in aid of its jurisdiction, and such injunction and restraining order is vacated.

Judge Cameron was not available to participate in this order.

ENTER:

I CERTIFY THIS IS A TRUE COPY

/s/ John R. Brown

JOHN R. BROWN
UNITED STATES CIRCUIT JUDGE
March 10, 1964

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 593

KOEHRING COMPANY,
Petitioner,

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Respondent,

AND

KOEHRING COMPANY,
Petitioner,

vs.

VARDAMAN S. DUNN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

I.

No Special or Important Reason Exists for Granting Certiorari

The instant case, we submit, meets none of the traditional tests which have prompted the issuance of the Writ of Certiorari.

In *Layne & Bowler Corporation* v. *Western Well Works*, 261 U.S. 422, 43 S.Ct. 422, 66 L.Ed 792, a Writ of Certiorari was dismissed as having been improvidently granted. Mr Chief Justice Taft, speaking for a unanimous Court, said:

> ". . . If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals. The present case certainly comes under neither head."

The above announcement was quoted with approval by the Court in *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897, and in this latter case the Court also observed that:

> ". . . A federal question raised by a petition may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 S.Ct. 531, 532, 67 L.Ed. 922; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup.Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc.Am.Law Inst. 313. 'Special and important reasons imply a reach to a problem beyond the academic or the episodic. . . .'"

As pointed out by Mr. Chief Justice Vinson:

"What the Court is interested in is the actual, practical effect of the disputed decision—its consequences for other litigants and in other situations."[1]

We gather from the cited authorities and this Court's rules[2] that (1) the question to be answered must be both special and important and this importance must be to the public and not merely to the litigants in the particular case; and (2) it is not every apparent conflict that is to be resolved. It must be a conflict which is *real* and *embarrassing* and one which is of a potentially recurring nature.

II.

There Is No Conflict Between the Two Circuits

The unreported order of the Fifth Circuit simply recited that, pending order of the District Court in Mississippi, "this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma."

There was no opinion rendered by the Fifth Circuit and no effort was made to rationalize the order in terms of reason or precedent. That which was rendered was purely a procedural direction whereby that Court acted to divest itself of further control over the case. Having thus acted, it then devolved upon the transferee Court to resolve the timing of commencing its own exercise of jurisdiction in relation to any relief requested by the litigants. This the Tenth Circuit did by the decision that its jurisdiction attached when, but not until, the Court papers were transmitted and filed with the Clerk of the District Court in Oklahoma

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1. Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 S.Ct. vi, cited with approval by the Court in *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897.

2. Rule 19, Revised Rules of the Supreme Court of the United States.

A conflict could have arisen between the two circuits only if one had ordered the case transferred and the other had refused to accept the case for ultimate disposition, thus casting the litigants adrift without benefit of forum. This did not occur. The case was transferred and was received and is still pending in Oklahoma. The only question remaining was limited to the timing of the receipt of the case as between the date of the Fifth Circuit's order of March 10, 1964 and the transmission and filing of the Court file on March 16, 1964. And since the Fifth Circuit had rejected any further control over the case by its decision to transfer, the timing of receipt question was one for the transferee Court to determine for itself. One Court fixed the date of departure and the other fixed the date of arrival. Each Court acted within its own jurisdiction without interference and certainly without any "embarrassing" conflict and without any conflict on matters of substance.

Indeed, in making the decision as to the time of vesting of jurisdiction in the Northern District of Oklahoma the Tenth Circuit could hardly have reached any other conclusion. In addressing itself to the question of *when* jurisdiction vested in a transferee court, the Tenth Circuit noted the following authorities holding that the transfer of the Court papers to the transferee Court is considered essential to that Court's acquisition of jurisdiction: *Drabik* v. *Murphy,* (CA 2d) 246 F.2d 408; and *Wright on Federal Courts,* p. 143.[3]

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3. To the same effect, see: *Littman* v. *Bache & Co.,* (CA 2d) 246 F.2d 490; *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.,* (CA 2d) 178 F.2d 866; *Fisher* v. *United Airlines, Inc.,* (S.D., N.Y., 1963) 218 F.Supp. 223; and *Tele-Views News Co., Inc.* v. *S.R.B. TV Publishing Co., Inc.,* (E.D., Pa., 1961) 28 F.R.D. 303 (modified on re-argument on other grounds).

III.

If There Be Conflict, Such Is Not of a Recurring Nature, Nor Is It Real, in the Important Sense, or Embarrassing, and the Question Is Not of Public Importance

The matter presented is not likely to be a recurring problem.

The action of the Fifth Circuit is without precedent. It finds no counterpart in past judicial history. The situation from which it emerged is quite unique and is not apt to again occur.

The matter is not of importance to the public; its importance is limited to the litigants in this particular case. A timing difference of a few hours or days in the procedural aspects of transfer from one district to another is not likely to be of any real importance to future litigants and most certainly not to the public at large. If the transferor Court desires to maintain some status quo, it can always introduce an injunction as a traveling companion to accompany the case to its intended destination, and if an interested litigant wants more immediate action than a routine transfer furnishes, he can personally see to the physical transfer of the file.

If there be any conflict between the Fifth and Tenth Circuits, it is one largely of a procedural feature in the handling of this one isolated case and is neither real (in the important sense) nor embarrassing, because each Court has fully constrained itself to action within its own sphere and competence and all issues of substance have been finally and unquestionably resolved and set at rest.

CONCLUSION

We submit that the present case does not rise above the commonplace controversy between private litigants and the issue argued by petitioner involves no principles the re-settlement of which is of sufficient important to merit review by this Court.

For the stated reasons, we submit that the Writ of Certiorari should be denied.

Respectfully submitted,

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October, 1965.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 593

KOEHRING COMPANY,
Petitioner,

VS.

HYDE CONSTRUCTION COMPANY, INC.,
Respondent,

AND

KOEHRING COMPANY,
Petitioner,

VS.

VARDAMAN S. DUNN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR REHEARING AND MOTION TO AMEND ORDER OF REMAND

BRIEF IN SUPPORT OF PETITION AND MOTION

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IN THE

SUPREME COURT OF THE UNITED STATES

KOEHRING COMPANY, *Petitioner,* vs. HYDE CONSTRUCTION COMPANY, INC., ET AL., *Respondents.*	No. 593

RESPONDENTS' PETITION FOR REHEARING AND MOTION TO AMEND ORDER OF REMAND

Respondents, Hyde Construction Company, Inc. and Vardaman S. Dunn, respectfully petition the Court for rehearing of the decision and judgment in this cause and move the Court to amend the order remanding the case to the District Court for the Northern District of Oklahoma, to the end that the case may be remanded to the Court of Appeals for the Tenth Circuit for completion by that Court of its appellate review processes in the light of this Court's decision and judgment, and for grounds state the following:

1.

The only issue decided by the Court of Appeals was the transfer-jurisdictional issue, and this single threshold issue was the sole issue involved in the question presented to and decided by this Court on the writ of certiorari.

2.

Several additional points were specified, briefed and argued in the Court of Appeals, presenting serious issues

vitally affecting or dispositive of the case under review. Such issues were not reached or decided by the Court of Appeals, but were pretermitted by that Court in view of its ruling on the threshold jurisdictional decision.

3.

The Court of Appeals has not completed its appellate function of reviewing the judgment of the District Court on the basis of the record and the points specified, briefed and argued before that Court, and the review process cannot be completed if the Court of Appeals is by-passed by remanding the case to the District Court, except upon a subsequent appeal attended by unnecessary expense and delay.

WHEREFORE, Respondents respectfully pray that they be afforded a re-hearing for the purpose of presenting the grounds outlined above, and Respondents respectfully move the Court to amend its order or mandate to the extent of directing that the cause be remanded to the Court of Appeals for the Tenth Circuit for further proceedings and appellate review in that Court, and in support hereof Respondents submit the sub-joined brief.

BRIEF IN SUPPORT OF PETITION AND MOTION

PRELIMINARY STATEMENT

Under date of January 17, 1966, this Court granted a petition for writ of certiorari filed by the Koehring Company, and reversed the judgment of the Court of Appeals for the Tenth Circuit and directed that the case be remanded to the District Court for the Northern District of Oklahoma for further proceedings consistent with this Court's opinion. The Court of Appeals had reversed a judgment of the District Court on the stated ground that the District Court had acted prior to the transfer to it of jurisdiction over the parties and subject matter. The single question presented on the petition for writ of certiorari was the validity of the jurisdictional determination, which in turn depended upon the timing of an order transferring the principal controversy from the District Court in Mississippi to the District Court in Oklahoma. Both the petition for certiorari and the decision of this Court on the petition were also limited to the single question thus presented, and this Court determined that the view of the Court of Appeals on the jurisdictional issue was erroneous and that jurisdiction had been transferred to the District Court at the time that Court acted.

Respondents do not attempt by this petition and motion to have the Court re-hear or reconsider its decision upon the jurisdictional point involved. Our single point is that since the decision of the Court of Appeals on transfer jurisdiction is to be reversed, the case should be remanded to the Court of Appeals instead of to the District Court, in order that the Court of Appeals may, in the light of this Court's threshold ruling, complete its appellate review as to the several points specified in that Court and upon which the merits of the decision of the Trial Court were debated.

ARGUMENT

I.

Serious Appellate Issues Are Now Properly Presented for Decision and Remain Undecided by the Court of Appeals

In its opinion,[1] the Court of Appeals observed that "As argued by the parties, this case presents a myriad of complex issues, particularly the jurisdiction of a district court to determine its own jurisdiction and the power of a federal court to enjoin a state court action under exceptions to 28 U.S.C. § 2283.[2] See 348 F.2d at p. 647. The probable existence of serious questions, yet undecided, was noted in the opening paragraph of Justice Black's dissenting opinion.

Since the Court of Appeals decided that the judgment was void for want of jurisdiction, it concluded that other contentions were not properly before it and no decision was made thereon. Those contentions of the Koehring Company contrary to the jurisdictional issue were found to be without merit. This leaves the "myriad of complex issues" undecided and squarely presented for decision after this Court's reversal.

The "complex issues" have not been resolved except for the one threshold issue involving the question of the transfer jurisdiction of the District Court. A reference to the petition of the Koehring Company for writ of certiorari at page 3 will demonstrate that the single question presented to the Court on the petition was likewise limited

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1. *Hyde Construction Company, Inc.* v. *Koehring Company,* (C.A. 10th, 1965) 348 F.2d 643.

2. Other issues involved are hereinafter noted.

to the transfer-jurisdictional question, and accordingly this was the only issue considered by this Court on the petition, and the only issue that was decided by this Court upon the granting of the petition.

Since the jurisdictional issue lay at the threshold of judicial review, the Court of Appeals elected to halt its judicial review at the threshold of its consideration of the case as a whole by what proves now to have been an erroneous concept of the timing of the transfer of jurisdiction to the Oklahoma District Court.

Some of the points specified, briefed and argued in the Court of Appeals may be summarized as follows:

I. The restraining order issued by the District Court was ineffective because: (A) The cause of action in which the Court acted had been dismissed by Hyde's Notice of Dismissal in conformity with Rule 41(a)(1) of the Federal Rules of Civil Procedure; (B) At the time of the entry thereof, the Lower Court had not been invested with jurisdiction of the cause of action by any proper transfer; and (C) Koehring made no prima facie showing by petition or otherwise to establish an exception to 28 U.S.C.A. 2283.

II. Even if the District Court was vested with jurisdiction and power to issue the restraining order, the order was erroneously issued and therefore cannot support the relief granted to a private litigant in a proceeding in *civil contempt*. The right to remedial relief falls with a restraining order which events prove was erroneously issued.[3] The restraining order was erroneously issued since the State

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3. *United States* v. *United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677; *Salvage Process Corporation* v. *Acme Tank Cleaning Process Corporation*, (C.A. 2d) 86 F.2d 727; *Cliett* v. *Hammons*, (C.A. 5th) 305 F.2d 565.

Court had concurrent jurisdiction and the independent right to proceed to judgment.[4]

III. One of the sanctions imposed by the order of the District Court in civil contempt was to enjoin execution and collection of the State Court judgment, and this novel sanction amounted to a denial of full faith and credit to the judgment of the State Court contrary to law.

The only decision was on Point I (B), as outlined above. A decision favorable to Appellants upon any one of the remaining points would have been equally dispositive of the judgment imposing sanctions in *civil contempt.* These are serious points. Our position upon each is well supported by the authorities generally and by decisions of this Court. Our brief in the Court of Appeals covered thirty-five pages, with the citation of numerous authorities. Only two pages were devoted to the transfer jurisdiction point, I (B) above.

The record on the petition for certiorari in this case required only a review and decision upon the one threshold jurisdictional issue and, in fact, the record here did not attempt to present the remaining appellate issues. So, in accord with its customary practice, this Court did quite appropriately "avoid rendering a decision beyond the obvious requirements of the record." Cf. *Barr* v. *Matteo,* 355

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4. Certainly the 10th Circuit, by abstaining from deciding other points presented by the appellants before it, did not and could not have intended to reject such authoritative decisions of this court as *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 43 S.Ct. 79, 24 A.L.R. 1007, *Princess Lida of Thurn and Taxis* v. *Thompson,* 305 U.S. 456, 59 S.Ct. 275, and *Penn General Casualty Co.* v. *Commonwealth of Pennsylvania,* 294 U.S. 189, 55 S.Ct. 386, or its own prior decisions precisely in point, such as: *Skelly Oil Co.* v. *Phillips Petroleum Co.,* (C.A. 10th) 174 F.2d 89, *Wells* v. *Helm,* (C.A. 10th) 105 F.2d 402, and *Denver-Greeley Valley Water Users Assn.* v. *McNeil,* (C.A. 10th) 131 F.2d 67.

U.S. 171, 78 S.Ct. 204. We do not ask this Court to pass upon those important questions which were before the Court of Appeals and which remain unresolved by that Court. We would not conceive this to be appropriate or in conformity with precedent or established appellate practice, or the statutory scheme designed to relieve the litigation load of this Court by providing for appellate functions in the Courts of Appeal.

II.

The Case Should Be Remanded to the Court of Appeals

A remand to the *District Court* can settle none of the questions presented to the Court of Appeals which remain undecided. Therefore, the remand, we submit, should be to the Court of Appeals for completion of its review function. This has been the course consistently taken in the past where the decision of a Court of Appeals has been against the claim of jurisdiction in the District Court, and where other questions are left undecided because of such threshold determination.

Mitchell v. *Robert De Mario Jewelry, Inc.*, (1960) 361 U.S. 288, 80 S.Ct. 332, was an action by the Secretary of Labor to enjoin violations of the Fair Labor Standards Act forbidding discrimination against and discharge of an employee for institution proceedings under the Act. The District Court ordered reinstatement of the discharged employees but refused to order reimbursement for loss of wages on the assumed lack of jurisdiction so to do. The Court of Appeals for the Fifth Circuit affirmed on the jurisdictional point, and therefore did not reach or decide the question of an alleged abuse of discretion in failing to order reimbursement. The Supreme Court reversed, but in so doing remanded the case to the Court of Appeals, concluding as follows:

". . . The Court of Appeals did not reach the question whether the District Court abused its discretion in declining to order reimbursement. While, because of what we have found to be the statutory purposes there is doubtless little room for the exercise of discretion not to order reimbursement, since we do not have the entire record before us we shall remand the case to the Court of Appeals for consideration of that issue."

United States v. *Beach,* (1945) 324 U.S. 193, 65 S.Ct. 602, was a criminal case involving the Mann Act. The Court of Appeals reversed a judgment of conviction on the single ground that the Act was inapplicable to transportation of a female taking place wholly within the District of Columbia. The Supreme Court reversed and remanded to the Court of Appeals, saying:

"As the Court of Appeals did not pass upon other grounds for reversal urged by respondent, the case is remanded to it for further proceedings not inconsistent with this opinion. Bates v. United States, 323 U.S. 15, 17, 65 S.Ct. 15, 16, and cases cited."

In *Bates* v. *United States,* (1944) 323 U.S. 15, 65 S.Ct. 15, another criminal case, the Court reversed and remanded to the Court of Appeals, saying:

". . . We do not consider the merits of the Government's contention that the conviction can be sustained on other grounds, since, in the circumstances of this case, we deem it more appropriate that the Court of Appeals consider that question in the first instance. . . ."

In *Buzynski* v. *Luckenbach S. S. Co., Inc.,* (1928) 277 U.S. 226, 48 S.Ct. 440, the Court reversed the Court of Appeals and remanded to that Court. The Court said:

"The view of the Circuit Court of Appeals that the Contracting Company would not be liable for the negligence of a fellow servant, was erroneous, and its

> judgment must be reversed. But since it did not determine whether the accident was in fact due to such negligence, or to some other cause, the case will be remanded to that court with instructions to determine this question and take further proceedings in conformity with this opinion. See Cole v. Ralph, 252 U.S. 286, 290, 40 S.Ct. 321, 64 L.Ed. 567; Gerdes v. Lustgarten, 266 U.S. 321, 327, 45 S.Ct. 107, 69 L.Ed. 309."

In *Cole* v. *Ralph*, (1920) 252 U.S. 286, 40 S.Ct. 321, the Court said that it might deal only with the matter considered by the Court of Appeals or "remand the case to it for any needed action upon other questions, or proceed ourselves to a complete decision." The Court in this case took the latter action as preferable in the particular case "inasmuch as counsel have united in presenting to us all questions thought to arise upon the record," etc.[5]

The circumstances under which a case will be remanded to a Court of Appeals or to a District Court are rather clearly set forth in *Gerdes* v. *Lustgarten*, (1924) 266 U.S. 321, 45 S.Ct. 107. This case involved a question of a right to a discharge in bankruptcy because of the issuance of a false financial statement. Neither the District Court nor the Court of Appeals decided the question of fact which was found by the Supreme Court to be controlling and in this situation the Court commented as follows:

> "The question then arises as to what disposition we should now make of the case. The material questions of fact in reference to the financial statement, upon which the decision must ultimately depend, have

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5. In the case at bar, neither the record presented nor the briefs submitted nor the hearing afforded the parties include any issue save the transfer-jurisdictional issue. Furthermore, this Court has not elected the course of "complete decision", but has limited itself to consideration and determination of the one jurisdictional issue thus presented.

not as yet been determined in the courts below. They were not decided by the referee who heard the testimony; they were apparently assumed by the District Court; and they were not passed upon by the Circuit Court of Appeals on account of its ruling in reference to the lapse of time. We may now either determine these questions upon an independent examination of the testimony, or remand the case for further proceedings in order that they may be determined in the lower courts. Cole v. Ralph, 252 U.S. 286, 290, 40 S.Ct. 321, 64 L.Ed. 567. If they had been specifically decided by the District Court and only the Circuit Court of Appeals had failed to pass upon them, an appropriate course would be to remand the case to the Circuit Court of Appeals. Lutcher Lumber Co. v. Knight, 217 U.S. 257, 268, 30 S.Ct. 505, 54 L.Ed. 757; Brown v. Fletcher, 237 U.S. 583, 588, 35 S.Ct. 750, 59 L.Ed. 1128. But since they were not expressly decided by the District Court, we conclude that, under all the circumstances, we should take the course adopted in Marconi Wireless Co. v. Simon, 246 U.S. 46, 57, 38 S.Ct. 272, 62 L.Ed. 568, that is, reverse the decrees in both the courts below and remand the case to the District Court. If it be determined that the financial statement was materially false and that the Bank made the loans in reliance upon it, the discharge should be denied, otherwise it should be granted."

In other words, when the Court of Appeals has completed its appellate function insofar as it can do so on the record as made in the District Court and the next essential step is the determination of some fact or issue by the District Court, a remand to the Court of Appeals serves no useful purpose and the cause goes directly back to the District Court. On the other hand, when there remains for decision in the Court of Appeals one or more questions or issues which may affect or be dispositive of the case, the remand is to that Court so that it may complete its appellate work and fully discharge its duty

and responsibility of intermediate review. The case at bar presents the latter situation.

In *United States* v. *Wrightwood Dairy Co.*, (1942) 315 U.S. 110, 62 S.Ct. 523, the Court said:

> "The judgment will be reversed, but as errors assigned below have not been passed on there or argued here, the cause will be remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion. The mandate will issue forthwith."

In cases involving threshold issues of jurisdiction or the right to maintain an action where the District Court is reversed by the Court of Appeals for lack of jurisdiction, without passing upon other questions raised on appeal, this Court, on reversal of the Court of Appeals, has invariably remanded to that Court instead of to the trial or District Court.

Several of the earlier cases were reviewed and approved in *Brown* v. *Fletcher*, (1915) 237 U.S. 583, 35 S.Ct. 750. In this case, the Court of Appeals was found to have erroneously concluded that the trial court lacked diversity jurisdiction. On certiorari, this Court declined to pass upon other questions and held that the proper procedure was to remand to the Court of Appeals. The Court said:

> "Indeed, the views just stated have been applied by previous rulings. Lutcher & M. Lumber Co. v. Knight, 217 U.S. 257, 54 L.ed. 757, 30 Sup. Ct. Rep. 505; United States v. Rimer, 220 U.S. 547, 55 L.ed. 578, 31 Sup. Ct. Rep. 596; William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co., 228 U.S. 645, 57 L.ed. 1003, 33 Sup. Ct. Rep. 722. In the Lutcher Case, which was brought here by the allowance of a writ of certiorari, it was found

that the court below, the circuit court of appeals of the fifth circuit, had from a mistake of law refused to consider the merits of the case, and although it was recognized that, as the result of the certiorari, the whole case was open to our review, it was yet pointed out that as, by the provisions of the act of 1891 [26 Stat. at L. 826, chap. 517], the cause was one which, apart from certiorari, was within the competency of the circuit court of appeals, and its judgment, when rendered, would be final, the duty of this court was not to determine the case on the merits, but, after correcting the error which had stood in the way of the court below performing its duty, to remand the case to that court so that such duty might be discharged. So in the Rimer Case which was brought here by certiorari—when it was discovered that the writ had obviously been allowed upon a mistaken conception as to the existence in the case of a far-reaching question of public importance justifying the issue of the writ, it was pointed out that, the mistake becoming apparent, it was our duty not to decide the case, but to remand it to the circuit court of appeals, to which the certiorari had been directed, to enable that court to discharge its duty. And the same principle was involved in the Cramp Case, where, after the case had been brought to this court by certiorari, and it was held that the decision of the court below was void because the court which decided it was not legally organized, while it was recognized that there was power under the certiorari to dispose of the whole case, it was held that the duty arose, in order to give effect to the statute, not to decide but to remand the case so that when the court below was organized conformably to the statute, the case might be considered and disposed of as the statute contemplated it should be.

"While it follows from these considerations that the decree below must be reversed, it also results that it is our duty to remand the case to the court below that is, the Circuit Court of Appeals, to the end

that, all questions concerning its jurisdiction as a Federal court having been determined by the prior decision of this court, it proceed to discharge its duty of hearing and deciding the case conformably to law.

"Reversed and remanded for further proceedings consistent with this opinion."

In *Fischer* v. *American United Life Ins. Co.*, (1941) 314 U.S. 549, 62 S.Ct. 380, the District Court assumed jurisdiction over a controversy against the contention that the action was in rem and exclusively within the State Court jurisdiction under a precedently filed action involving the same subject matter. There was an appeal from the final decree on the merits which also raised the jurisdictional issue. The Court of Appeals held that the District Court had no jurisdiction and therefore did not pass on the remaining appellate issues. This Court reversed and remanded the case to the Court of Appeals, concluding:

"We express no opinion on the merits of the controversy. Nor do we pass on the contention that Ladew v. Tennessee Copper Co., 218 U.S. 357, 31 S.Ct. 81, 54 L.ed. 1069, prevents the entry of an in personam judgment in the circumstances of this case. For the sole question passed upon by the court below was the power and propriety of the action of the District Court in taking jurisdiction of the cause under § 57 of the Judicial Code."

ALSO

"Whether the scope of the decree entered by the District Court was proper we do not decide. We only hold that the District Court had jurisdiction to resolve the controversy under § 57 of the Judicial Code. The Circuit Court of Appeals should have decided what rights under Iowa law Iowa and its receiver had to the securities and the collections thereon

and whether the decree entered by the District Court was kept within the appropriate limits. Since the Circuit Court of Appeals did not decide those questions, we reverse its judgment and remand the cause to it for further proceedings in conformity with this opinion. It is so ordered."

See also: *Swanson* v. *Traer*, (1957) 354 U.S. 114, 77 S.Ct. 1116.

In *Grant* v. *A. B. Leach & Co.*, (1930) 280 U.S. 351, 50 S.Ct. 107, the Court of Appeals, on appeal from a decree for a corporate receiver for recovery of corporate assets, reversed and dismissed the cause on the ground that the receiver was without authority to sue. The Supreme Court reversed and remanded to the Court of Appeals. The Court said:

"As the view of the Circuit Court of Appeals that the Receiver was without authority to bring the action against Leach & Co. was erroneous, its judgment must be reversed. And since it did not determine the merits of the Receiver's claim, the case will be remanded to that court with instructions to proceed to that end in conformity with this opinion. See Buzynski v. Luckenbach S. S. Co., 277 U.S. 226, 228, 48 S.Ct. 440, 441, 72 L.ed. 860, and cases cited."

CONCLUSION

This case has a long history in the Chancery and Supreme Courts of Mississippi and in the Federal District Court in Mississippi and in the Court of Appeals for the Fifth Circuit and in the Federal District Court in Oklahoma and in the Court of Appeals for the Tenth Circuit. The circumstances are many and varied, and in some respects quite novel. The record made in these Lower Courts has not been presented to the Court on the petition for

certiorari, and we shall ask this Court to take our word for the fact that there is much in this case that has not met and could not meet the eye of this Court. These circumstances are within the view and grasp of the Court of Appeals for the Tenth Circuit, which has received briefs and heard arguments of the parties on the "myriad of complex issues" involved. We respectfully submit that the Court of Appeals should be afforded the opportunity to first determine what questions remain open for decision in the light of the jurisdictional reversal and to reach and announce its decision upon the several serious points involved in this case in the full light of the entire record before that Court, and that the parties should not be put to the added expense and delay of a subsequent appeal presenting the same points after remand to the District Court for the Northern District of Oklahoma, and this is especially so since any further proceedings which might be conducted in the District Court would be without the guidance of an appellate decision upon the fundamental aspects of the law as applied to the peculiar and particular circumstances involved.

In conclusion, for what it may be worth, we digress from the narrow point here presented to assure this Court, as we have assured the Courts below, that Respondents did not proceed in the State Courts in "disregard" for the order of the Oklahoma District Court, but rather proceeded in regard for prior and subsequent State Court orders to proceed with the case on a determination by that Court that any further delay would result in extreme injustice and hardship on the litigating parties. And we can further assure the Court that the record in this cause on review will reflect that it was the Koehring Company's representatives who first proceeded in disregard of a precedent State Court mandatory order. In short, we beseech this Court to regard the rights of these Respondents without discoloration by

the attempt of the Koehring Company to have Respondents' actions prejudged as contemptuous without consideration of all of the facts and circumstances established on the record.

Respectfully submitted,

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JANUARY, 1966

CERTIFICATE OF GOOD FAITH

The undersigned, of counsel for Respondents, certifies that the foregoing petition and motion is presented in good faith and not for delay.

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CHARLES CLARK
Of Counsel for Respondents

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 593

KOEHRING COMPANY, PETITIONER

v.

HYDE CONSTRUCTION COMPANY, INC., RESPONDENT

and

KOEHRING COMPANY, PETITIONER

v.

VARDAMAN S. DUNN, RESPONDENT

BRIEF IN OPPOSITION TO RESPONDENTS' MOTION TO AMEND ORDER OF REMAND

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BRIEF IN OPPOSITION TO RESPONDENTS' MOTION TO AMEND ORDER OF REMAND

Respondents, Hyde Construction Company, Inc. and Vardaman S. Dunn, have filed a document with this Court entitled "Petition for Rehearing and Motion to Amend Order of Remand." Although the document seems to be principally a petition for rehearing and the Supreme Court Rules do not provide for briefs in response thereto, Koehring felt it necessary to respond in the event this Court might to some extent consider it a motion.

Respondents' sole argument here is that the United States Court of Appeals for the Tenth Circuit decided only one of the issues which were before it, leaving the remaining issues unanswered. Their motion and petition are entirely dependent on that proposition.

That proposition is not correct. The Court of Appeals clearly intended to, and did, decide all the issues before it. It reviewed the *entire* order:

> "Since the injunction is inseparable from the contempt orders, whose validity in turn depends upon the jurisdiction of the lower court, this court may and will review the entire order of September 1, 1964." [1]

After deciding the jurisdictional issue in favor of Respondents, the Court of Appeals went on to say:

> "The injunction and the contempt judgments are vacated and the cases are remanded for proceedings consistent with this opinion. *Other contentions made on these appeals are either not properly before this court or are found to be without merit.*" (Emphasis supplied) [2]

The Court of Appeals had devoted a considerable portion of its opinion to the jurisdictional question. Clearly, when it went on to discuss "other contentions", it was not discussing contentions on the subject of jurisdiction.

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[1] Appendix B, Petition for Writ of Certiorari, P. 24; *Hyde Construction Company, Inc. v. Koehring Company* (C.A. 10, 1965), 348 F. 2d 643, 647.

[2] Appendix B, Petition for Writ of Certiorari, P. 27; *Hyde Construction Company, Inc. v. Koehring Company* (C.A. 10, 1965), 348 F. 2d 643, 649.

Respondents Hyde and Dunn have misleadingly paraphrased the opinion to suggest that the plain language "other contentions" means the *same* contentions.[3] The Court of Appeals clearly disposed of all contentions, both jurisdictional and "other". Respondents appear to forget that it was they as *appellants* who were making the contentions before the Court of Appeals.

Respondents Hyde and Dunn have also gone beyond the boundaries of proper appellate procedure by not limiting their argument to the record before this court and by insinuating that there are facts outside that record which would somehow establish that Hyde and Dunn did not proceed in disregard of a Court order, and that this would affect the ruling of the Court. Limiting ourselves to the record, the insinuation is amply rebutted by the finding of the District Court for the Northern District of Oklahoma, with all the facts before it, that Respondents had contemptuously disregarded its order.

Respectfully submitted,

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Dated February 16, 1966

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[3] "Since the Court of Appeals decided that the judgment was void for want of jurisdiction, it concluded that other contentions were not properly before it and no decision was made thereon. Those contentions of the Koehring Company contrary to the jurisdictional issue were found to be without merit. * * *" (Respondent's Petition and Motion, P. 4)

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AND

KOEHRING COMPANY,
Petitioner,

VS.

VARDAMAN S. DUNN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

REPLY TO PETITIONER'S BRIEF IN OPPOSITION

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Petitioner criticizes Respondents' construction of the concluding sentence of the Tenth Circuit's opinion as misleading. It states that *only* the Respondents, Hyde and

Dunn, who were Appellants in the court below, made "contentions" before the Tenth Circuit. Respondents respectfully submit that such a conclusion of Tenth Circuit's opinion is erroneous and that the error is most simply illustrated by a re-reading of the Tenth Circuit's opinion in its entirety. In the course of such a re-reading, it will be noted that the Tenth Circuit expressly considered and dealt with conditions advanced by Koehring,[1] as well as by Hyde and Dunn.

With deference, we submit, that other important and dispositive questions pend before the Tenth Circuit which are now ripe for that court's decision in the light of the reversal here of its threshold jurisdictional decision. It is certain that no wording in the Tenth Circuit's opinion was addressed to those questions, beyond its express recognition that they had been urged by the parties,[2] Koehring disagrees.

But, quite aside from the fact that the parties here don't agree as to what the wording of the Tenth Circuit's opinion means, the narrow question here and now presented is simply this: Should the Court of Appeals be

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1. *E. g.* Note such language as "Initially Koehring claims . . .", "Therefore, argues Koehring, . . ." and "This position of Koehring overlooks . . .". *Hyde Construction Company, Inc.* v. *Koehring Company,* (C.A. 10, 1965) 348 F.2d 643, 647; Appendix B, Petition for Writ of Certiorari, pp. 24 and 25.

2. See *Hyde Construction Company, Inc.* v. *Koehring Company,* (C.A. 10, 1965) 348 F.2d 643, 647; Appendix B, Petition for Writ of Certiorari, p. 24, where the court said, "As argued by the parties, this case presents a myriad of complex issues, particularly the jurisdiction of a district court to determine its own jurisdiction and the power of a federal court to enjoin a state court action under exceptions to 28 U.S.C §2283."

allowed to interpret its own opinion, in relation to what may or may not be before it for further review and decision in the light of this court's reversal on the threshold jurisdictional point?

An affirmative answer will result in a remand to the Court of Appeals, followed by that court's resolution of what, if any, questions remain for decision on the present record there on file. A negative answer would result in by-passing the Court of Appeals and a probable duplication of the same appellate process which has brought the case to its present status.

We submit that where, as here, there is no conclusive evidence that the Court of Appeals has exhausted its appellate functions and duties (on the basis of the record before it), this Court has consistently declined to by-pass the Court of Appeals and remand directly to the District Court. The cases cited in our initial brief are all consistent with this practice and Koehring has cited no case to the contrary.

If the Tenth Circuit truly meant to continue past its threshold jurisdictional ruling and rule on the remaining "myriad of complex issues" in a single sentence, it may quickly say so and shortly remand the case to the District Court for final conclusion. On the other hand, if the Tenth Circuit did not intend to rule on those other issues presented, an overall delay in the ultimate disposition of this case would be caused by first requiring further proceedings in the District Court, necessitating a subsequent request for appellate review which could and should be had now. Much in the way of time and expense may be saved by

sending this case back to the Court of Appeals. Nothing of substance can be lost by this course of action.

Respectfully submitted,

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